

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GYPSY D. GONZALEZ and JOSE M.	)	
GONZALEZ, wife and husband,	)	NO. CV-07-3034-LRS
	)	
Plaintiffs,	)	ORDER DISMISSING CLAIMS
	)	AGAINST DEFENDANTS
-vs-	)	LINDSTROM AND YAKIMA VALLEY
	)	FARM WORKERS CLINIC AND
MERCK & CO., INC., d/b/a Merck,	)	STAYING CASE
a New Jersey corporation, JAMES	)	
E. LINDSTROM, M.D., an	)	
individual, and YAKIMA VALLEY	)	
FARM WORKERS CLINIC,	)	
	)	
Defendants.	)	

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BEFORE THE COURT is Defendant Merck & Co., Inc.'s [Merck] Motion to Stay All Proceedings Pending a Decision on Transfer by the Judicial Panel on Multidistrict Litigation, Ct. Rec. 10, filed June 21, 2007; and Defendants James E. Lindstrom, M.D.'s and Yakima Valley Farm Workers Clinic's Motion for Judgment on the Pleadings in Favor of Defendants Lindstrom and Yakima Valley Farm Workers Clinic, Ct. Rec. 18, filed June 29, 2007. The motions were noted for July 23, 2007 without oral argument.

A. Background

Multidistrict litigation proceedings, which this case is part of, have been established in the Eastern District of Louisiana to coordinate

1 all federal product liability actions involving Vioxx, *In re Vioxx Prods.*  
2 *Liab. Litig.*, 360 F.Supp.2d 1352 (J.P.M.L. 2005). On June 5, 2007  
3 Defendant Merck removed this action from Yakima County Superior Court to  
4 this Court based on diversity jurisdiction under 28 U.S.C. §1332. On  
5 June 8, 2007, Merck provided notice to the Judicial Panel on  
6 Multidistrict Litigation [MDL Panel] of the pendency of this "tag-along"  
7 action pursuant to Rule 7.5(c) of the Rules of Procedure of the Judicial  
8 Panel on Multidistrict Litigation. On July 12, 2007, the Court received  
9 a letter from the Chairman of the MDL Panel indicating that a notice of  
10 opposition to the Panel's conditional transfer order in this matter was  
11 presently before the Panel pursuant to 28 U.S.C. §1407. The letter  
12 additionally indicated that jurisdiction continued with this Court until  
13 any transfer ruling became effective. The letter also invited this Court  
14 to rule on any pending motions before it. This Court has chosen to rule  
15 on Defendants Lindstrom and Yakima Valley Farm Workers Clinic's  
16 [Defendants] motion for judgment on the pleadings pursuant to  
17 Fed.R.Civ.P. 12(c) and RCW 7.70.150 and Defendant Merck's motion to stay  
18 proceedings.

19 B. Defendants' FRCP 12(c) Motion

20 Defendants request the Court to dismiss the case against them based  
21 on Plaintiffs' failure to file a certificate of merit that complies with  
22 RCW § 7.70.150(5)(a). Plaintiffs concede that they did not comply with  
23 all procedural requirements but urge that a dismissal without prejudice  
24 is the appropriate remedy rather than a dismissal with prejudice.  
25 Plaintiffs argue that a dismissal with prejudice is a harsh result and  
26 not favored by courts.

1 Defendants reply that they are seeking a dismissal of the case  
2 against Defendants Lindstrom and Yakima Valley Farm Workers Clinic only  
3 and such dismissal is not intended to be with prejudice or a judgment on  
4 the merits. Defendants state that the Court should simply dismiss the  
5 action pending against these two defendants pursuant to Fed.R.Civ.P.  
6 12(c).

7 Indeed RCW 7.70.150(5)(a) reads:

8 (5) (a) Failure to file a certificate of merit that  
9 complies with the requirements of this section is  
grounds for dismissal of the case.

10 It is undisputed that Plaintiffs did not file a certificate of merit as  
11 required by RCW 7.70.150.

12 A Rule 12(c) motion provides a vehicle for summary adjudication on  
13 the merits, after the pleadings are closed but before trial, which may  
14 save the parties needless and often considerable time and expense which  
15 otherwise would be incurred during discovery and trial. Fed. R. Civ.  
16 Pro. 12(c); *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7<sup>th</sup> Cir.  
17 1993). Generally, this means that a Rule 12(c) motion must await the  
18 answers of all defendants. *Moran v. Peralta Community College Dist.*, 825  
19 F.Supp. 891, 893 (N.D.Cal.1993). A pleading's legal conclusions and  
20 inferences will not be deemed admitted, *Northern Ind. Gun & Outdoor*  
21 *Shows, Inc. v. City of South Bend*, 163 F.3d 499, 452 (7<sup>th</sup> Cir.1998), but  
22 Rule 12(c) judgment will be granted if the pleadings demonstrate that the  
23 moving party is entitled to judgment as a matter of law. *Fajardo v.*  
24 *County of Los Angeles*, 179 F.3d 698, 699 (9<sup>th</sup> Cir.1999).

25 Rule 12(c) may be employed as a vehicle for raising several of the  
26 defenses enumerated in Rule 12(b), including the defense of failure to

1 state a claim upon which relief may be granted. See 5 Wright & Miller,  
2 Federal Practice and Procedure: Civil s 1367. Dismissal may be based on  
3 either the lack of a cognizable legal theory or the absence of sufficient  
4 facts alleged under a cognizable legal theory. *Balistreri v. Pacifica*  
5 *Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Judgment on the  
6 pleadings is only warranted where it appears beyond doubt that the  
7 plaintiff will be unable to prove any facts to support the alleged claims  
8 for relief. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th  
9 Cir.2002).

10 In this case, as all Defendants have answered Plaintiffs' Complaint,  
11 the Court finds that Defendants' Rule 12(c) motion is timely. RCW  
12 7.70.150 does not provide the Court with guidance on the type of  
13 dismissal that it contemplates. "Courts have discretion to grant leave  
14 to amend in conjunction with 12(c) motions, and may dismiss causes of  
15 action rather than grant judgment." *Moran*, 825 F.Supp. at 893 (citing  
16 *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979)).

17 The mere fact that this motion is couched in terms of a motion for  
18 judgment on the pleadings does not prevent the Court from disposing of  
19 the motion by dismissal rather than by judgment. Therefore, the claims  
20 against Defendants Lindstrom and Yakima Valley Farm Workers Clinic are  
21 dismissed without prejudice.

22 C. Defendant Merck's Motion to Stay

23 Defendant Merck requests a stay of all proceedings pending a  
24 decision on the transfer by the MDL panel. Defendant Merck argues that  
25 judicial economy mandates a stay of this matter and that absent a stay,  
26 Merck will be prejudiced.

1 The other parties to this action have not opposed Defendant Merck's  
2 motion to stay. The Court agrees with Defendant Merck and well settled  
3 case law that dictates a stay should be granted to promote judicial  
4 economy.

5 Accordingly,

6 **IT IS HEREBY ORDERED** that:

7 1. Defendants James E. Lindstrom, M.D.'s and Yakima Valley Farm  
8 Workers Clinic's Motion for Judgment on the Pleadings in Favor of  
9 Defendants Lindstrom and Yakima Valley Farm Workers Clinic, **Ct. Rec. 18**,  
10 filed June 29, 2007 is **GRANTED**. The claims against Defendants Lindstrom  
11 and Yakima Valley farm Workers Clinic are **DISMISSED without prejudice**.

12 2. Defendant Merck & Co., Inc.'s Motion to Stay All Proceedings  
13 Pending a Decision on Transfer by the Judicial Panel on Multidistrict  
14 Litigation, **Ct. Rec. 10**, filed June 21, 2007 is **GRANTED**. This case is  
15 **STAYED** pending a decision from the MDL Panel.

16 The District Court Executive is directed to file this Order and  
17 provide copies to counsel.

18 DATED this 2nd day of August, 2007.

19 ***s/Lonny R. Suko***

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21 Lonny R. Suko  
22 United States District Judge  
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